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No. 08-751

In the Supreme Court of the United States

COUNTY OF EL PASO, ET AL.,
Petitioners,

v.

JANET NAPOLITANO, SECRETARY,
U.S. DEPARTMENT OF HOMELAND SECURITY, AND
U.S. DEPARTMENT OF HOMELAND SECURITY,
Respondents.

On Petition for a Writ of Certiorari to the United States District Court for the Western District of Texas

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

A. Petitioners Have Standing To Challenge The Preclusion Of Judicial Review 1

B. This Court Should Grant Review To Determine Whether Judicial Review Is Essential When Congress Delegates Broad Power To Administrative Agencies To Impinge On Private Rights 5

C. This Court Should Grant Review To Decide Whether An Agency Has Authority To Preempt State And Local Law On Its Own Authority Absent An Express Delegation. 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Boumediene v. *Bush*, 128 S. Ct. 2229 (2008) 8

Chicago & Southern Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) 7

CSX Transp., Inc. v. *Easterwood*, 507 U.S. 658 (1993) 12

Cuomo v. *Clearing House Association, LLC*, cert. granted, No. 08-453 (Jan. 16, 2009) 11

Dalton v. *Specter*, 511 U.S. 462 (1994) 7

Darr v. *Burford*, 339 U.S. 200 (1950) 6

Defenders of Wildlife v. *Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), cert. denied, 128 S. Ct. 2962 (2008) 6

Franklin v. *Massachusetts*, 505 U.S. 788 (1992) 7

Geier v. *American Honda Motor Co.*, 529 U.S. 861 (2000) 11

INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 9

Lincoln v. *Vigil*, 508 U.S. 182 (1993) 7

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 1, 2

NLRB v. *United Food & Commercial Workers Union*, 484 U.S. 112 (1987) 7

South Dakota v. *United States Department of the Interior*, 69 F.3d 878 (8th Cir. 1995), vacated, 519 U.S. 919 (1996) 8

Summers v. *Earth Island Institute*, 129 S. Ct. 1142 (2009) 2

United States v. *Bozarov*, 974 F.2d 1037 (9th Cir. 1992) 8

TABLE OF AUTHORITIES—continued

Page(s)

United States v. *Shaughnessy*, 338 U.S. 537 (1950) 7, 9

United States v. *Widdowson*, 916 F.2d 587 (10th Cir. 1990), vacated, 502 U.S. 801 (1991) 8

Wade v. *Mayo*, 334 U.S. 672 (1948) 6

Wyeth v. *Levine*, No. 06-1249 (March 4, 2009) 9, 11

Yakus v. *United States*, 321 U.S. 414 (1944) 6, 7

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 9

STATUTES

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, tit. I, 110 Stat. 3009-5554, as amended ..... *passim*

OTHER AUTHORITIES

Black's Law Dictionary (8th ed. 2004) 11

REPLY BRIEF FOR PETITIONERS

The government's opposition cannot obscure the importance of the issues presented or the lower courts' need for guidance. *First*, it argues that petitioners do not have standing to challenge the preclusion of judicial review under Section 102(c). U.S. Br. 8. *Second*, it claims that the decision below, upholding Section 102(c)'s sweeping delegation notwithstanding the preclusion of review, follows established precedent. *Id.* at 16. *Third*, the government contends that Section 102(c) "plainly" confers authority upon the Secretary of Homeland Security to preempt state and local law. *Id.* at 25. None of these contentions has merit.

A. Petitioners Have Standing To Challenge The Preclusion Of Judicial Review.

The government's challenge to petitioners' Article III standing, U.S. Br. 8-11, is contrary to the factual record and to this Court's standing doctrine.

1. Absent Section 102(c) and the challenged waivers, petitioners would have had statutory causes of action and remedies to ensure that the construction of the fence occurs in a lawful manner that does not threaten a variety of concrete injuries they have alleged in their pleadings. In *Lujan* v. *Defenders of Wildlife*, the Court set forth the standing analysis appropriate to plaintiffs claiming procedural injuries—such as the complete denial of judicial review of the waivers challenged in this case—with the recognition that "all the normal standards for redressability and immediacy" are *not* required when the right a plaintiff seeks to enforce is essentially procedural. 504 U.S. 555, 572 n.7 (1992). The critical inquiry is whether "the procedures in question are de-

signed to protect some threatened concrete interest of [the plaintiffs] that is the ultimate basis of his standing." *Id.* at 573 n.8. So long as the underlying tangible injury suffices for standing, the procedural injury will establish standing as well. *Lujan*'s examples of constitutionally sufficient procedural allegations closely parallel the allegations here. See *ibid.*

Summers v. *Earth Island Institute*, 129 S. Ct. 1142 (2009), is to the same effect. While *Summers* states that a procedural injury "*in vacuo*" cannot confer standing, it reaffirms that a procedural injury that affects a live dispute over a "concrete interest" does. *Id.* at 1151.

2. Provision of judicial review could redress petitioners' claimed concrete injuries. Cf. U.S. Br. 10. The government appears to suppose that construction of a border fence *not* in compliance with applicable law would cause the same injuries as construction *in* compliance with the law, and so an injunction against construction would be the only apt remedy for an injury sustained by unlawful construction of the fence. But to state this argument is to refute it. Assuring that the construction of the fence proceeds in compliance with applicable federal laws could result in a variety of modifications to the design of the fence or the manner of its construction. Consequently, a legal error in the Secretary's waivers can be remedied short of enjoining the construction altogether. Judicial review for conformance with statutory standards would ensure a mode and manner of construction that preserves petitioners' concrete interests.[1]

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[1] Due to a typographical error, the Petition incorrectly stated petitioners' requested remedy. See Pet. 33. The Court could

3. The government also claims that petitioners lack standing to challenge the Secretary's waiver of state and local laws "related to" the 37 waived federal laws because "the governmental petitioners do not cite any particular state or local provision that has been invalidated or the validity of which the waivers have called into question." U.S. Br. 11. This is an ironic argument, since it is *the Secretary* who has declined to specify which state and local laws have been preempted. As petitioners have explained, Pet. 28, given Section 102(c)'s preclusion of review, the Secretary's vague pronouncement of preemption means that she has arrogated to herself the future determination of exactly which state and local laws must be displaced in order to accommodate construction activities. Any cause or claim "arising from" any waiver determination—including, presumably, any dispute over which state and local laws are preempted—is barred from review 60 days after the waiver is made. § 102(c)(2)(B).

More fundamentally, local government entities, such as petitioners City of El Paso and County of El Paso, cannot be required to prove concrete injury, causation, and redressability before challenging the preemption of their own laws. Governments have a sovereign interest in enforcing their own laws. Respondents' position here is that the Secretary has the power unilaterally to preempt state and local laws, that Congress can insulate such a determination from judicial review, and that the local governments whose laws are preempted have no standing to challenge these determinations. A more extreme and un-

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remedy the limitations on judicial review by enjoining the second and third sentences of Section 102(c)(2)(A), not the second section of Section 102(c)(1).

constitutional subordination of state and local authority is difficult to imagine.

4. The government did not argue that petitioners' underlying claims of injury fail to satisfy Article III standing requirements in the court below, for good reason. Petitioners include a county, a city, an Indian tribe, public corporations, advocacy groups, and an individual landowner. The injuries articulated by petitioners encompass private rights directly impinged by the Secretary's published waivers, as well as injuries to property arising from the Department's construction pursuant to those waivers. Among the examples in the record:

- Construction of the fence will block petitioner Ysleta del Sur Pueblo Indian tribe from accessing and protecting sacred tribal grounds that are important for religious and ceremonial purposes. Compl. ¶ 29; Decl. of Frank Paiz (June 23, 2008) ¶ 4.
- The construction will continue to damage and disrupt the infrastructure owned and maintained by petitioner El Paso County Water Improvement District No. 1, which provides water to more than 600,000 urban residents and farmers. Compl. ¶ 28; Decl. of Jesus Reyes (June 23, 2008) ¶¶ 7-8.
- The waiver of state and local law, including the Texas Antiquities Code, reduces the value of an historic building operated as a business near the Mexican border by petitioner Mark Clark and clouds his rights as owner and proprietor of property

in the area subject to the waiver of all applicable law. Compl. ¶ 32.

There can be no doubt that these injuries are concrete and particularized. Petitioners' standing is clearly established, and their injuries are redressable by a suitable judgment in this case. This Court has authority to resolve the case.

B. This Court Should Grant Review To Determine Whether Judicial Review Is Essential When Congress Delegates Broad Power To Administrative Agencies To Impinge On Private Rights.

The government erroneously claims that the delegation of broad discretion to waive laws that protect private rights, combined with a preclusion of judicial review to determine whether such waivers comport with the statutory standard, is consistent with this Court's decisions and does not conflict with lower court authority.

1. On the contrary, this Court has repeatedly pointed to the availability of judicial review in rejecting constitutional challenges to congressional delegations of authority; and it has never approved a broad delegation in which *no* form of judicial review for compliance with Congress's articulated policy can be found in a statute. See Pet. 12-14. Because it has never confronted a statute that wholly prohibited judicial review for conformity with Congress's will, the Court has not heretofore needed to determine whether such review is a necessary condition of up-

holding the constitutionality of broad delegations of authority to the Executive.[2]

2. Although the Court has not squarely held that judicial review is required where broad delegations of legislative authority threaten private rights, its precedents strongly suggest the Constitution compels this result. In at least five cases, this Court has emphasized that judicial proceedings are the means for determining whether an agency has conformed its action to the intelligible principle established by Congress. See Pet. 13-14. Allowing Congress to delegate broad legislative power to an agency subject to an intelligible principle, while at the same time removing the primary mechanism for ensuring that the agency adheres to that principle, defeats the very purpose of requiring an intelligible principle.

The government argues that the purpose of the intelligible principle requirement is to ensure broad public accountability, not judicial review. U.S. Br. 21. It emphasizes a passage in *Yakus* v. *United States* stating that the requirements of the challenged statute were "sufficiently definite and precise to enable Congress, the courts and the public to ascertain" whether the will of Congress was being obeyed. 321 U.S. 414, 426 (1944).

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[2] The government claims this Court's order denying certiorari in *Defenders of Wildlife* v. *Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), cert. denied, 128 S. Ct. 2962 (2008), as evidence that the judicial review issue has been resolved. See U.S. Br. 14. Yet there are a variety of plausible reasons for the denial of review in *Defenders of Wildlife*. Pet. 31-32. Moreover, "[w]rits of certiorari are matters of grace," *Wade* v. *Mayo*, 334 U.S. 672, 680 (1948), so "such a denial has no legal significance whatever bearing on the merits of the claim." *Darr* v. *Burford*, 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting).

Yet this Court also stated in *Yakus* that the purpose of requiring Congress to articulate an intelligible principle is to be able "in a proper proceeding to ascertain whether the will of Congress had been obeyed." *Id.* at 426. In context, this clearly refers to judicial review. And even if the intelligible principle requirement is designed to promote broad public accountability, it does not follow that the requirement may not serve an *additional and independent* purpose to provide a basis for judicial review, especially where the delegated power can be used to impair private rights, nor that judicial review is a dispensable ingredient in assuring public accountability.

The government's claim that this Court has approved delegations not subject to judicial review ignores the context of these decisions, which did not involve unreviewable action impinging on private rights. Compare Pet. 20 with U.S. Br. 22-25. Four of the cases cited by the government involved direct delegations of power to the President,[3] while the others involved unreviewable prosecutorial discretion, *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112 (1987), and unreviewable power to spend lump sum appropriations, *Lincoln* v. *Vigil*, 508 U.S. 182 (1993). At most, these cases establish that acts of Congress do not create a need for judicial review over areas where the President and Executive could otherwise exercise core executive functions. They do not establish that Congress could give the

[3] *Dalton* v. *Specter*, 511 U.S. 462 (1994); *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992); *United States* v. *Shaughnessy*, 338 U.S. 537 (1950); *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948).

Executive broad power to interfere with private rights, and make the exercise of such power unreviewable. For example, they do not show that the Executive can be authorized to seize and hold persons against their will without any possibility of judicial review. Cf. *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008).

2. The government also fails to refute that the circuits are fundamentally divided on the necessity of judicial review to bind a broad delegation to its intelligible principle. Pet. 15-17; U.S. Br. 14-16. *South Dakota* v. *United States Department of the Interior*, 69 F.3d 878 (8th Cir. 1995), vacated, 519 U.S. 919 (1996), and *United States* v. *Widdowson*, 916 F.2d 587 (10th Cir. 1990), vacated, 502 U.S. 801 (1991), were vacated on the understanding that judicial review was available. See Pet. 16-17. The Eighth and Tenth Circuits' reasoning that judicial review was required in those cases plainly conflicts with the Ninth Circuit's clear holding in *United States* v. *Bozarov*, 974 F.2d 1037, 1041 (9th Cir. 1992). The Court should grant review to eliminate the continuing confusion in the federal courts and the uncertainty surrounding whether the reasoning in cases like *South Dakota* and *Widdowson* may remain persuasive.

3. The government's opposition raises the novel defense that the Executive's special authority at the Nation's borders creates immunity from review of its actions there. See U.S. Br. 17-18. Under the government's view, the Executive could apparently exercise inherent authority to waive federal, state, and local laws in the vicinity of the United States border even *without* congressional authorization. See *ibid.* This sweeping theory of Executive power has no sound basis. See *Youngstown Sheet & Tube Co.* v. *Sawyer*,

343 U.S. 579 (1952). Nor do the government's authorities support this extraordinarily broad view of executive power. In *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999), and *United States* v. *Shaughnessy*, 338 U.S. 537 (1950), this Court simply reaffirmed the well-established principle that courts should defer to the Executive with regard to decisions to exclude individual aliens. See 526 U.S. at 425; 338 U.S. at 542-543. Nothing in either case suggests that the Executive's foreign affairs power extends so far as to allow the government to trample on federalism and separation of powers principles in the course of constructing a fence inside of the United States but near a foreign border.

C. This Court Should Grant Review To Decide Whether An Agency May Preempt State And Local Law On Its Own Authority Absent An Express Delegation.

The lower courts are divided on the question whether a general grant of rulemaking authority to an Executive agency suffices to empower that agency to preempt state and local law on its own authority. See Pet. 26-27. The government ignores the undeniable controversy among the circuits, advancing only a defense of the Secretary's authority. U.S. Br. 25-28. The Court should resolve the conflict.

1. The government characterizes Section 102(c) as a "clear and unequivocal delegation of authority from Congress authorizing [the Secretary] to preempt." U.S. Br. 27. Yet Section 102(c)'s grant of "waiver" authority does not remotely resemble the language Congress uses to expressly preempt state law. See Pet. 24 n.2; *Wyeth* v. *Levine*, No. 06-1249 (March 4, 2009), slip op. at 20 n.9.

a. The government cites a handful of remarks from the Congressional Record as evidence that "Congress understood that the reference to 'all legal requirements' was broad enough to reach state and local laws." U.S. Br. 27 & n.10. But those cited remarks refer to *different proposed statutory language* that was never enacted into law.

In the bill referred to in the government's citation, the waiver provision directed that the Secretary "shall waive all laws" necessary to ensure expeditious construction of barriers and roads. REAL ID Act, H.R. 418, 109th Cong., § 102 (2005). That bill also purported to foreclose all judicial review, even of constitutional violations. *Ibid.* In the version actually enacted, however, Congress rejected the "all laws" formulation and instead authorized the Secretary to waive "all legal requirements," suggesting a different understanding of the Secretary's authority. In any event, the legislative history of a bill containing language different from that actually enacted is entitled to little weight.

b. The government next seeks to conflate waiver with preemption. See U.S. Br. 26. As the government recounts, *id.* at n.9, in a prior version of the statute, *Congress*—not the Secretary—"waived" the Endangered Species Act and National Environmental Policy Act. As the government concedes, "In that context, 'waived' was appropriate because the concept of 'preemption' does not normally apply to *federal* statutes." *Ibid.* But the government's inference that "waived" became synonymous with "preempted" when the references to the ESA and NEPA were replaced with "all legal requirements" in the final REAL ID Act has no grounding in the text of the statute or its legislative history.

c. The government's argument from "natural English usage" is unavailing. U.S. Br. 27. "Waive" means either (1) "[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.); to give up (a right or claim) voluntarily," or (2) "[t]o refrain from insisting on (a strict rule, formality, etc.); to forgo." *Black's Law Dictionary* 1611 (8th ed. 2004). Both definitions contemplate the suspension of legal requirements an agency otherwise has the right to insist on applying. But state and local law are not normally a federal agency's "to give up" or "refrain from insisting on." Thus, such laws are not a federal agency's to "waive."

2. As a fallback, the government urges that Section 102(c) functions as an ordinary authorization of conflict preemption, to be invoked at the Secretary's behest. It suggests that "the Secretary could [] preempt state law" even without a statutory authorization. U.S. Br. 27-28. While it is certainly true that state law may be preempted absent an express statement from Congress where it conflicts directly with federal law, *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000), the Court has never gone so far as to approve the government's startling contention that an agency may determine for itself when such a conflict has occurred and declare the assertedly conflicting state laws preempted. Cf. *Wyeth*, *supra* at 19 (Court does not rely on "agency proclamations of preemption").[4]

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[4] *Cuomo* v. *Clearing House Association, LLC*, cert. granted, No. 08-453 (Jan. 16, 2009), asks the Court to determine whether *Chevron* deference is due an agency's interpretation of the scope of an *express* statutory preemption clause. That petition acknowledges that the related question raised here remains an open one. Pet., No. 08-453, at 24.

The government does not bother to explain how a conflict preemption analysis is appropriate given that the waivers do not even identify the state and local laws preempted, but merely purport to preempt all state and other laws "deriving from, or related to the subject of" 37 waived federal laws. See Pet. App. 4a-5a, 15a-17a. The fact that "[t]o prevail on the claim that [] regulations have pre-emptive effect, [the Secretary] must establish more than that they 'touch upon' or 'relate to' that subject matter," *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993), strongly suggests that the Secretary's ambiguous preemptive orders of all laws "*related to*" three dozen federal laws exceed her statutory authority, and hence have no constitutional foundation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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